NORDIN HJ ZAKARIA
(TIMBALAN KETUA POLIS KELANTAN) & ANOR

v.

MOHD NOOR ABDULLAH

FEDERAL COURT, KUALA LUMPUR
AHMAD FAIRUZ CJ (MALAYA)
SITI NORMA YAAKOB FCJ
MOHTAR ABDULLAH FCJ
[CIVIL APPEAL NO: 01-1-2001 (W)]
21 MAY 2004

POLICE: *Disciplinary proceedings - Procedural fairness - Dismissal of junior police officer - Whether reg. 28(1) of Public Officers (Conduct & Discipline) Regulations 1993 applies in favour of junior officer in disciplinary proceedings conducted under Police (Conduct & Discipline) (Junior Police Officers & Constables) Regulations 1970 - Generalibus specialia derogant - Whether disciplinary authority required to inform junior police officer before start of orderly room procedure of possibility of being dismissed from the force if found guilty - Whether failure to inform occasions procedural unfairness*

PUBLIC SERVANTS: *Disciplinary proceedings - Procedural fairness - Dismissal of junior police officer - Whether reg. 28(1) of Public Officers (Conduct & Discipline) Regulations 1993 applies in favour of junior officer in disciplinary proceedings conducted under Police (Conduct & Discipline) (Junior Police Officers & Constables) Regulations 1970 - Generalibus specialia derogant - Whether disciplinary authority required to inform junior police officer before start of orderly room procedure of possibility of being dismissed from the force if found guilty - Whether failure to inform occasions procedural unfairness*

ADMINISTRATIVE LAW: *Public servants - Dismissal of junior police officer - Whether disciplinary authority required to inform junior police officer before start of orderly room procedure of possibility of being dismissed from the force if found guilty - Whether failure to inform occasions procedural unfairness - Whether reg. 28(1) of Public Officers (Conduct & Discipline) Regulations 1993 applies in favour of junior officer in disciplinary proceedings conducted under Police (Conduct & Discipline) (Junior Police Officers & Constables) Regulations 1970 - Generalibus specialia derogant*

Pursuant to the disciplinary proceedings initiated by the Deputy Chief Police Officer for the State of Kelantan ('the appellant' herein), the respondent, a lance-corporal, was found guilty and was dismissed from the Royal Malaysia Police ('the Force'). The respondent then brought a suit against the appellant in the High Court but it was dismissed. On appeal, however, the Court of Appeal found for the respondent and held that there was procedural unfairness in the disciplinary proceedings conducted by the appellant, chiefly because the appellant did not inform the respondent, before the commencement of the proceedings, that he could be punished with dismissal or a reduction in rank if he were to be found guilty.

The two issues of law that fell for determination before the justices of the Federal Court in the instant appeal were: (1) whether the disciplinary authority, before conducting the disciplinary proceedings (orderly room procedure) under the Police (Conduct & Discipline) (Junior Police Officers & Constables) Regulations 1970 ('the 1970 Regulations'), is required to inform a junior police officer such as the respondent that he may be dismissed from the force if he is found guilty; and (2) whether reg. 28(1) of the Public Officers (Conduct & Discipline) Regulations 1993 ('the 1993 Regulations') applies in favour of a junior officer such as the respondent in the disciplinary proceedings conducted under the 1970 Regulations.

Held (allowing the appeal and reversing the Court of Appeal)
Per Siti Norma Yaakob FCJ delivering the judgment of the court:

[1] Although the respondent fell generally within the category of officers who are members of the public service as defined by s. 3 of the 1993 Regulations, nonetheless, he specifically came within the ambit of reg. 1(2)(a) of the 1970 Regulations which applies to all junior police officers and constables. Since the 1970 Regulations have been expressly made to regulate the discipline of junior police officers holding the rank of constable and below, the 1993 Regulations can only apply to senior police officers above the rank of constable. A special provision in a special statute excludes the operation of a general provision dealing with the same subject matter. The general provision concerning the identity of the person affected by the 1993 Regulations is displaced by the express provision as to the identity of the person affected by the 1970 Regulations. *Generalibus specialia derogant.* (pp 783 a-g, 785 h & 786 a-c)

[2] There is nothing in the 1970 Regulations that requires or entitles the respondent to be informed before the commencement of the orderly room procedure that he might be punished with dismissal or a reduction in rank if he were to be found guilty. As there is no provision in the 1970 Regulations imposing an obligation similar to that prescribed by s. 28(1) of the 1993 Regulations, the appellant could not be said to have deprived the respondent of procedural fairness by not so informing the latter. There cannot be a breach of duty where none exists in law. (pp 784 e-h, 785 a, h & 786 a-c)

[Both questions of law answered in the negative.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden, seorang anggota polis berpangkat lance-corporal, telah dipecat dari perkhidmatannya dalam Polis Di Raja Malaysia ('pasukan') setelah prosiding tatatertib yang diadakan oleh Timbalan Ketua Polis Negeri Kelantan ('perayu di sini'), mendapatinya bersalah terhadap tuduhan yang dikenakan. Responden kemudian membawa kesnya ke Mahkamah Tinggi tetapi guamannya itu telah ditolak. Walau bagaimanapun, sewaktu rayuan, Mahkamah Rayuan telah berpihak kepada responden dengan menyatakan bahawa telah berlaku ketidakadilan prosedur pada prosiding tatatertib yang diambil oleh perayu, terutama atas kegagalan perayu memberitahu responden, sebelum prosiding bermula, bahawa beliau boleh dihukum pecat atau diturunkan pangkat jika didapati bersalah.

Dua isu undang-undang yang berbangkit untuk keputusan yang arif hakim-hakim Mahkamah Persekutuan di sini adalah: (1) sama ada pihak berkuasa tatatertib, sebelum memulakan prosiding tatatertib (orderly room procedure) di bawah Peraturan-Peraturan Polis (Kelakuan dan Disiplin) (Pegawai Polis Rendah dan Konstabel) 1970 ('Peraturan 1970'), dikehendaki memberitahu seseorang pegawai polis berpangkat rendah seperti responden bahawa beliau mungkin akan dipecat dari pasukan jika didapati bersalah; dan (2) sama ada per. 28(1) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan 1993') terpakai kepada seorang pegawai rendah seperti responden dalam prosiding tatatertib yang dibuat di bawah Peraturan 1970.

Diputuskan (membenarkan rayuan dan mengakas Mahkamah Rayuan)
Oleh Siti Norma Yaakob HMP menyampaikan penghakiman mahkamah:

[1] Walaupun responden pada amnya tergulung ke dalam kategori pegawai-pegawai yang menjadi ahli perkhidmatan awam seperti yang ditakrif oleh s. 3 Peraturan 1993, namun, beliau dirangkumi secara spesifik oleh per. 12(a) Peraturan 1970 yang terpakai kepada semua pegawai polis rendah dan konstabel. Oleh kerana Peraturan 1970 secara nyata digubal untuk

mengawalselia disiplin pegawai-pegawai polis rendah yang berpangkat konstabel ke bawah, Peraturan 1993 hanya boleh terpakai kepada pegawai-pegawai tinggi polis berpangkat konstabel ke atas. Suatu peruntukan khas dalam suatu statut khas akan menyingkir pemakaian peruntukan am mengenai halperkara yang sama. Peruntukan am berkaitan identiti orang yang dijejas oleh Peraturan 1993 telah diganti dan diambil alih oleh peruntukan nyata mengenai identiti orang yang dijejas oleh Peraturan 1970. *Generalibus specialia derogant.*

[2] Tiada apa-apa pun di dalam Peraturan 1970 yang mengkehendaki atau memberi hak kepada responden supaya diberitahu sebelum permulaaan 'orderly room procedure' bahawa beliau mungkin akan dihukum dengan pemecatan atau penurunan pangkat jika didapati bersalah. Oleh kerana tiada peruntukan dalam Peraturan 1970 yang menetapkan kewajipan yang serupa seperti yang dibuat oleh s. 28(1) Peraturan 1993, perayu tidak boleh dikatakan sebagai telah menidakkan keadilan prosedur kepada responden kerana tidak memberitahunya. Kemungkiran tanggungjawab tidak boleh berlaku jika tiada tanggungjawab wujud di sisi undang-undang.

Kedua-dua persoalan undang-undang dijawab secara negatif.]

Case(s) referred to:

B Surinder Singh Kanda v. The Government of the Federation of Malaya [1962] 28 MLJ 169 ***(refd)***

Ganasan Marimuthu v. Public Services Commission & Anor [1998] 4 CLJ 331 CA ***(refd)***

Ghazi Mohd Sawi v. Mohd Haniff Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 CLJ 333 SC ***(refd)***

PP v. Chu Beow Hin [1982] CLJ 110; [1982] CLJ (Rep) 288 FC ***(refd)***

S Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors [1982] CLJ 65; [1982] CLJ (Rep) 314 FC ***(refd)***

Samsuddin Mohd Saad v. Pengarah Hospital Bahagia, Ulu Kinta & Anor [1999] 1 CLJ 138 HC ***(refd)***

UHG v. Director General of Inland Revenue [1974] 2 MLJ 331 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 78(1)

Federal Constitution, arts. 132(2), 135

Police Act 1967, ss. 74, 96(1), (2)(b)

Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970, regs. 1(2)(a), 2, 3, 4, 5, 6, 7, 8, 9

Public Officers (Conduct and Discipline) Regulations 1993, regs. 3, 28(1)

For the appellants - Abdul Aziz Abdul Rahim SFC (Ahmad Kamal Mohd Sahid SFC)
For the respondent - Karpal Singh (G Subramaniam Nair & Gobind Singh Deo); M/s Karpal SIngh & Co

*[**Editor's note:** the Police (Conduct & Discipline) (Junior Police Officers & Constables) Regulations 1970 has been repealed by the Police (Conduct and Discipline) (Junior Police Officers and Constables) (Repeal) Regulations 2000 which came into operation on 1 January 2001. The Public Officers (Conduct & Discipline) Regulations 1993 has been largely amended by the Public Officers (Conduct And Discipline) (Amendment) Regulations 2002 which came into operation on 20 June 2002.]*

[Appeal from Court of Appeal; Civil Appeal No: W-01-85-99]

Reported by Gan Peng Chiang

JUDGMENT

Siti Norma Yaakob FCJ:
Two questions have been posed in this appeal and they read as follows.

(1) Whether the Disciplinary Authority, before conducting the Disciplinary Proceedings (Orderly Room Procedure) under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970, is required to inform a Junior Police Officer such as the respondent of the possibility that he might be dismissed from service; and

(2) Whether reg. 28(1) of the Public Officers (Conduct and Discipline) Regulations 1993 applies to a Junior Police Officer such as the respondent in the disciplinary proceedings (Orderly Room Procedure) conducted under the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulation 1970.

The questions stem from the disciplinary proceedings initiated by the 1st appellant, the adjudicating authority, against the respondent, a Lance Corporal in the Police Force, who had to answer to four charges of misconduct. He was found guilty on three of the four charges and was dismissed from the Police Force.

The respondent questioned his dismissal in the High Court and the trial judge held that the 1st appellant had not breached any procedure laid down in the Police (Conduct and Discipline) (Junior Police Officers and Constables) Regulations 1970 ("the 1970 Regulations") under which the disciplinary proceedings were held and consequently the respondent's suit was dismissed with costs.

Dissatisfied, the respondent took his case to the Court of Appeal and this time he succeeded as the Court of Appeal held that there was procedural unfairness in the disciplinary proceedings conducted by the 1st appellant and declared the respondent's dismissal to be null and void. All other ancillary reliefs prayed for by the respondent in his suit were also granted by the Court of Appeal.

The procedural unfairness that forms the respondent's main complaint and which was upheld by the Court of Appeal relates to the failure of the 1st appellant to inform him before the commencement of the disciplinary proceedings as to the possibility of his dismissal or reduction in rank in the event he was found guilty on any of the charges that had been preferred against him. Before us this was the only issue argued as the other grounds of appeal raised in the Memorandum of Appeal were not submitted by either party.

In March 1997, when the disciplinary proceedings were commenced against the respondent, there were two regulations in force pertaining to matters of discipline governing members of the Police Force. The first is the 1970 Regulations made by the Yang di-Pertuan Agong in the exercise of his powers under s. 96(1) and (2)(b) of the Police Act 1967 ("the Act"). The second, also made by the Yang di-Pertuan Agong, is the Public Officers (Conduct and Discipline) Regulations 1993 ("the 1993 Regulations") under cl. 2 of art. 132 of the Federal Constitution.

It is the contention of Mr. Karpal Singh, counsel for the respondent, that the disciplinary proceedings against the respondent should have proceeded under the 1993 Regulations and not under the 1970 Regulations. He contended further that there is the added duty imposed by reg. 28(1) of the 1993 Regulations which requires the 1st appellant to inform the respondent of the likelihood of his dismissal or reduction in rank before the commencement of the disciplinary proceedings. As the show cause letter addressed to the respondent dated 24 February 1997, contained no such warning, there had been procedural unfairness in the conduct of the disciplinary proceedings against the respondent.

All members of the Police Force irrespective of their ranks are subject to the disciplinary regulations made from time to time by the Yang di-Pertuan Agong. This is clear from the provisions of s. 74 of the Act which read as follows.

> All members of the Force shall be subject to regulations relating to discipline as may from time to time be made by the Yang di-Pertuan Agong under Article 132 (2) of the Federal Constitution or under section 96 of this Act.

The 1993 Regulations apply to an officer who is defined by reg. 3 to be a member of the public service. Whilst it is true that the Respondent is such an officer, it must not be forgotten that at the material time he held the rank of a Lance Corporal, a junior police officer and as such he comes within the ambit of reg. 1(2)(a) of the 1970 Regulations which states that the 1970 Regulations apply to all junior police officers and constables recruited in the States of Malaya.

As I have stated earlier the Yang di-Pertuan Agong made the 1970 Regulations in the exercise of his powers under section 96 of the Act and has identified those regulations as the "Police (Conduct and Discipline) (Junior Police Officers And Constables) Regulations 1970" (emphasis is mine). Likewise in making the 1993 Regulations under cl. 2 of art. 132 of the Federal Constitution, the Yang di-Pertuan Agong had chosen to call them the "Public Officers (Conduct and Discipline) Regulations 1993" (emphasis is mine). Thus the caption of the two regulations is a factor to be considered in determining which of the two regulations should govern the disciplinary proceedings against the respondent.

As the 1970 Regulations have been expressedly made to govern the discipline of junior police officers holding the rank of Constable and below, the 1993 Regulations can only apply to all other senior police officers above the rank of Constables. There can be no other interpretation as to the application of these two regulations in relation to the public personnel to whom those regulations were intended.

Additionally on the operation of the principle of interpretation that a special provision in a special statute excludes the operation of a general provision dealing with the same subject matter, the 1970 Regulations have a better edge than the 1993 Regulations as regards the discipline of junior police officers holding the rank of Constables and below. To that extent the general provision regarding the identity of the person to be affected by the 1993 Regulations is displaced by the express provision as to the identity of the person affected by the 1970 Regulations. Authorities for this proposition are found in *U.H.G. v. Director General of Inland Revenue* [1974] 2 MLJ 331 and *Public Prosecutor v. Chu Beow Hin* [1982] CLJ 110; [1982] CLJ (Rep) 288.

The 1970 Regulations contain only nine principal clauses. Regulation 1 is the citation clause and it also identifies the personnel who shall be subjected to the regulations.

Regulation 2 specifies the various disciplinary offences as prescribed in the Schedule attached to the regulations.

Regulation 3 makes provisions as to the procedures to be followed when disciplinary proceedings are taken against an officer and the various punishments that can be meted out as set out in sub-paras. (a) to (g) in the Schedule upon conviction.

Regulations 4 & 5 set out the rights available to the officer who is the subject of a disciplinary charge and these include his right to be supplied with documents connected to the charge and to be represented at the enquiry by a police officer of his choice.

Regulation 6 outlines the procedures to be followed at the enquiry ie, the Orderly Room Procedure, in the event the officer pleads guilty or if he chooses to plead otherwise.

The power to confirm and discharge the officer is given to the adjudicating authority in lieu of awarding any other punishment by virtue of reg. 7 as is the power to adjourn any disciplinary enquiry from time to time under reg. 8.

Finally reg. 9 refers to the revocation of Part 1 of the Police Regulations 1952.

Reading the provisions of the 1970 Regulations in its entirety, I see no requirement that entitles the respondent to be informed of the possibility of him being dismissed or reduced in rank in the event he is convicted of any of the charges preferred against him in either the show cause letter or prior to the start of the disciplinary enquiry. There is no provision imposing a similar obligation as that prescribed by reg. 28(1) of the 1993 Regulations. Since the 1970 Regulations impose no duty on the 1st Appellant to inform the respondent at the first opportunity of the likelihood of his dismissal or reduction in rank, the 1st appellant cannot be said to have deprived the respondent of any procedural fairness as there cannot be any breach of duty where none exists in law.

In this respect, the Court of Appeal erred when it held that "what comes across is that the letter to the Appellant in the present instance did not bring to his attention the contemplated punishments to make him appreciate the gravity of the situation and thus enable him to give a satisfactory explanation as best as he could. That itself amounts to a deprivation of procedural fairness". Importing the provisions of reg. 28(1) of the 1993 Regulations into the 1970 Regulations would amount to adding words into the latter regulations and usurping a function which the Court of Appeal is not allowed to do. Moreover both the 1970 and 1993 Regulations were made pursuant to powers conferred by different statutes, the former under s. 96 of the Act and the latter under

cl. 2 of art. 132 of the Federal Constitution. Authoritative discussions on this aspect of the law can be found in the cases of (1) *S. Kulasingam & Anor v. Commissioner of Lands, Federal Territory & Ors* [1982] CLJ 65; [1982] CLJ (Rep) 314, (2) *Ghazi bin Mohd Sawi v. Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333, (3) *Ganasan Marimuthu v. Public Services Commission & Anor* [1998] 4 CLJ 331 and (4) *Samsuddin Mohd Saad v. Pengarah Hospital Bahagia, Ulu Kinta & Anor* [1999] 1 CLJ 138.

The concept of procedural fairness concerning the dismissal or reduction in rank in the public service is very much enshrined in cl. 2 of art. 135 of the Federal Constitution which states that no member of the public services of which the respondent is one "shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard". The Privy Council in the case of *B. Surinder Singh Kanda v. The Government of the Federation of Malaya* [1962] 28 MLJ 169 has defined that constitutional right to be as follows.

> If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused person to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.

Perusing the show cause letter requiring the respondent to attend the Orderly Room Proceeding it is noted that:

(1) he had been informed of the punishable provisions of the 1970 Regulations.

(2) all the important and relevant particulars appear clearly in the charges as to leave him with no doubt as to the specific allegations he had to answer and of the possible sentence that could be meted out under reg. 2 if found guilty.

(3) he was informed of his right to be supplied with all relevant documents pertaining to the charges upon written request.

(4) he could be represented by an officer of his choice provided such an officer does not hold a rank above that of the 1st appellant.

Clearly at the very first opportunity the respondent was made aware of the punishments that could be meted against him ranging from reprimand to dismissal and the respondent must have taken the whole matter seriously as he had not only claimed trial to all the four charges but had also engaged a counsel to lead his defence. As such, he was accorded every opportunity of being heard and given every opportunity to defend himself. After he was found guilty on

three of the four charges and before he was heard on his plea of mitigation, the 1st appellant had informed him of the possible sentence he could suffer under reg. 2 of the 1970 Regulations. At no time was the respondent left with doubts as to the nature of the punishments that could be meted against him both before the Orderly Room Procedure as well as after the charges had been proven against him. That being the case the procedure adopted by the 1st appellant to discipline the respondent under the provisions of the 1970 Regulations left no doubt that fairness was achieved and that the respondent's constitutional right to be heard had not been violated.

Having said that, I answer both questions posed in this appeal in the negative and consequently allow this appeal, set aside the orders of the Court of Appeal and order that costs be awarded to the appellants both here and below.

This judgment is delivered pursuant to s. 78(1) of the Courts of Judicature Act 1964 as one of the members of the panel who heard this appeal has since passed away and the other remaining member, my brother, Ahmad Fairuz Sheikh Abdul Halim, Chief Judge of Malaya, concurs that the two questions posed be answered negatively and in the result this appeal is allowed, the orders of the Court of Appeal are set aside and the costs to the appellants both here and below.